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Authorities

IN THE

Supreme Court of the United States

No. ....

S. J. Groves & Sons Company, *Petitioners*,

v.

Lindsay C. Warren, Comptroller General of the United States, *Respondent*.

PETITION OF S. J. GROVES & SONS COMPANY FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT ENTERED APRIL 19, 1943, BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AFFIRMING AN ORDER DATED NOVEMBER 4, 1942, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT.

PETITIONER IN MIDST OF INTER-AGENCY JURISDICTIONAL DISPUTE.

Petitioner has been caught, to its great detriment, in the midst of a jurisdictional dispute between the Secretary of the Interior and his contracting officer on the one side (R-9-12, 12-19, 22-31) and the respondent Comptroller General on the other side (R-31-51)—the jurisdiction claimed by the Interior Department officials being contained in

Article 15 of a Government Standard Form of Contract similar to Article 15 of another Government Standard Form of Contract upheld and enforced by this Court in *Callahan-Walker Construction Company* v. *United States,* No. 65, decided November 9, 1942, following the rule applied in 1878 in *Kihlberg* v. *United States,* 97 U. S. 398, while the jurisdiction claimed notwithstanding by the respondent originated in the Act of March 3, 1817, 3 Stat., 366 and is now contained in Section 305 of the Budget and Accounting Act of 1921 (Tit. 31, Sec. 71 U. S. Code).

The courts below refused to exercise their judicial power to resolve this jurisdictional dispute between the officers of the two Government Agencies (R-52, . .).

OPINIONS BELOW.

The District Court of the United States for the District of Columbia filed a memorandum for the clerk of that Court which is in the record (R-52). The United States Court of Appeals filed an opinion of April 19, 1943, which is not yet reported but is in the record.

JURISDICTION.

The jurisdiction of this Court for a writ of certiorari to review the judgment of April 19, 1943, by the United States Court of Appeals is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C., 347).

QUESTIONS PRESENTED.

1. Whether a decision of a contracting officer, twice approved by the head of the department concerned under Articles 4 and 15 of the Standard Government Form of Contract, set forth in paragraph 3 of the Bill of Complaint (R-2) and admitted in the Answer (R-19), is binding upon the respondent Warren as Comptroller General of the United States and should be carried out by him as a ministerial duty, it having been held by this Court that the ac-

counting officers of the United States had no power over similar acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect. *United States* v. *Mason & Hangar Company,* 260 U. S. 323, reaffirmed in 261 U. S. 610.

2. Whether the decision of a contracting officer pursuant to the terms of a lawful contract between the United States and the petitioner and the twice affirming decisions of the head of the department concerned, the Secretary of the Interior, which are made by the Contract final and conclusive on the parties, may be disregarded and interfered with by the respondent, as has been done in this case, when this Court as recently as its opinion of November 9, 1942, in *United States* v. *Callahan Walker Construction Company* has held, in effect, that decisions of the contracting officers of the United States under similar contract stipulations are conclusive and that even the United States Court of Claims may not disregard them.

3. Whether the respondent, as Comptroller General of the United States, has jurisdiction and authority of a discretionary character to refuse to be bound by administrative decisions of a contracting officer under contract stipulations similar to Articles 4 and 15 of this contract which this court has uniformly held, at least since *Kihlberg* v. *United States,* 97 U. S. 398 decided in 1878, to *United States* v. *Callahan Walker Construction Company,* No. 65, decided November 9, 1942, left no discretionary jurisdiction and authority in the courts to disregard them.

4. Whether the respondent, as Comptroller General of the United States, has discretionary jurisdiction and authority to disregard and refuse to be bound by numerous opinions and judgments of both this Court and the United States Court of Claims to the effect that similar decisions of contracting officers and/or heads of departments under similar stipulations in contracts with the United States are final and conclusive on both parties thereto.

5. Whether the law contemplates and requires that the respondent be permitted to disregard and refuse to carry out the lawful decisions of contracting officers rendered in accordance with the terms of contracts with the United States and compel contractors and the United States Government to undergo the expense and delays of suits against the United States merely to secure judicial affirmance of such decisions.

6. Whether the refusal of the respondent to carry out the decision of the contracting officer, twice affirmed by the head of the department concerned, was not arbitrary and capricious in view of the long line of decisions in both this Court and in the Court of Claims of the United States as to the conclusive effect of similar decisions of contracting officers under similar contract stipulations.

7. Whether there does exist as complete, speedy and inexpensive remedy in the United States Court of Claims for this petitioner as could be afforded by the proceedings in the courts below.

STATUTE INVOLVED.

The only statute involved is the present Section 305 of the Budget & Accounting Act of 1921 (Tit. 31, sec. 71, U. S. Code) originating in the Act of March 3, 1817, (3 Stat. 366) and carried forward as Section 236, Revised Statutes. The said Section 305 provides that:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Account Office."

STATEMENT OF THE CASE.

The material and basic facts in this case are essentially undisputed and are contained in a decision dated September 5, 1941, by the contracting officer, which is attached to the Answer as Exhibit A (R-22, 31) and in affirming deci-

sions dated December 1, 1941, and June 27, 1942, by the Acting Secretary of the Interior which are attached to the Complaint as Exhibits A and B (R-12-19, 9-12), respectively. Also such facts are stated in the Complaint (R-1-9) and the material ones admitted in the Answer (R-19-22).

These facts are that the Interior Department advertised pursuant to Section 3709, Revised Statutes, for bids for the construction of an earth filled dam (a dam constructed of earth) at Grassy Lake, high in the mountains of Idaho. Prospective bidders were furnished with copies of the drawings, specifications, and results of certain borings made by the Government to determine the subsurface conditions. They were also warned to visit the site of the work. Representatives of the petitioner did visit the site of the work and there inquired of the Government Engineer as to the location of the "borrow pits"— the place from which the earth was to be secured for the construction of the dam— and this Government Engineer reported to his superior officers that:

> "At the time prospective bidders were looking over the work, all of us, including Messrs. Savage and Berkey, confidently expected that the ridge on which test pits 7, 8, and 28 to 32 were located would yield sufficient material to complete the dam."
>
> "If I were to testify on the matter, I would admit that the contractor was advised that we expected the ridge in question would yield substantially all of the required borrow material" (R-28-29).

Petitioner's bid, being the lowest responsible bid received, was accepted and contract 12r-6560, dated October 5, 1936, was entered into on a Standard U. S. Government Form No. PWA-51, for the construction of the dam (R-1). This contract form, with which the petitioner had nothing whatever to do in drafting, contained a considerable number of printed articles, among which are Articles 4 and 15 under which the administrative decisions of September 5, 1941, December 1, 1941, and June 27, 1942, were rendered by the

officers of the Interior Department authorized by the terms of the contract to do so.

The petitioner was at great expense and delay, during the short working season in the high altitude where the dam was constructed, in clearing the borrow pit site indicated, as above stated, by the Government Engineer, and in building roads from the borrow pit to the dam site. After the removal of a comparatively small amount of the top surface of the borrow pit area, the petitioner's representatives discovered the presence in large quantities of a very hard substance, known as Rhyolite, below the depth of the Government borings in said area (R-2-3). The presence of this material was called to the attention of the Government representatives, as provided in Article 4 of the Contract (R-2), and it was finally determined by the Interior Department that said Rhyolite was unsuitable for use in the construction of the dam (R-3).

The petitioner was required by the Government Engineer to move to another designated borrow pit area. This area had to be cleared, roads built, etc., only to find—after the excavation of a comparatively small amount of material—that a similar condition of unsuitable Rhyolite was present. Several successive areas were in turn designated by the Government Engineer as borrow pit areas, these areas were cleared, roads built, etc., and unsuitable Rhyolite was again discovered until finally a site was designated from which the necessary material was secured for the construction of the dam (R-3).

As stated in the opinion of the court below, the presence of unsuitable Rhyolite was seasonably brought to the attention of the Government engineer and finally the petitioner submitted a claim to the Government authorities for the excess costs incurred because of the unknown subsurface conditions—the unknown presence of Rhyolite in the borrow pit areas—and representing the expense of clearing the several sites, building roads, drainage, etc., except the first

site, necessary to make use of the designated sites as borrow pit areas. This claim for the increased costs was filed in accordance with the aforesaid Article 4 of the contract.

The work was completed in the autumn of 1939. The Government engineer on the job, in a letter of January 23, 1940, had refused to allow the petitioner any amount as excess costs. (R-22 for recitation of this fact). The petitioner by letter of February 19, 1940, appealed to the Secretary of the Interior from that decision, as provided in Article 15 of the contract (R-4). This appeal was forwarded to the contracting officer, who treated it as a claim and delayed until March 15, 1941, before rendering his decision refusing to allow the claim. This decision was appealed from, as provided in Article 15 of the contract, whereupon the contracting officer in his decision of September 5, 1941, (R-22, 31), modified his decision of March 15, 1941, which was approved in the decisions of December 1, 1941, and June 27, 1942, by the Acting Secretary of the Interior (R-12-19, 22-31).

Thereupon a voucher was prepared by the Interior Department for the amount of $23,615.70 which had been allowed. The petitioner agreed to accept such amount in settlement, and the voucher with copies of the decisions of September 5, 1941, by the contracting officer, and December 1, 1941, by the Secretary of Interior, was sent to the General Accounting Office for the issuance of a certificate on which a disbursing officer could issue a check in payment (R-5).

It had required from the autumn of 1939 to December, 1941, to get the claim to the General Accounting Office allowed in part, only, nothing being allowed on the claim for increased expense of $70,000.00 by reason of misrepresentation of the length of the working seasons (R-13). The voucher remained in that office, unacted upon, until March 23, 1942, when a letter, (R-31-46), of that date was sent by the respondent to the Secretary of the Interior questioning the correctness of the aforesaid decisions of September 5 and December 1, 1941.

In substance, this letter of March 23, 1942, from the respondent to the Secretary of the Interior, asserted that under paragraph 47 of the specifications attached to the contract (Quoted in Record, pp. 39-41) and under paragraph 37 of the specifications (also quoted in Record, pp. 41-42), the contractor was not entitled to any additional payment as excess costs for clearing, etc., successive borrow pit areas.

The Acting Secretary of the Interior replied in his letter of June 27, 1942, to the said letter of March 23, 1942, adhering to the conclusions reached in his decision of December 1, 1941, and in the contracting officer's decision of September 5, 1941 (R-9-12). This letter of March 23, 1942, from the respondent, and the reply of June 27, 1942, from the Secretary of the Interior, did not constitute "prolonged correspondence between respondent and the Secretary of the Interior" as stated by the court below in the first paragraph of its opinion.

Nevertheless the respondent refused to issue the certificate on which a check could be issued in payment of the amount allowed (R-46-51), These proceedings in the courts below followed. The petitioner set forth the facts in the bill of complaint and alleged therein that it had no adequate remedy in a suit against the United States to recover the said amount of $23,615.70 allowed by the contracting officer and the Secretary of the Interior because of a number of reasons, to wit:

1. The United States is now at war and officers and employees of the United States, having knowledge of the facts, are engaged in the war effort. They could not be secured as witnesses on behalf of the Government, with the result that the case would have to be postponed until they became available as witnesses, which will be after the present war is over at some indeterminate future date (R-7-8).

2. A judgment of the Court of Claims would be no more binding on the respondent than the decisions of the contracting officer and the head of the Department, and since the judgment would have to be certified to Congress for an appropriation with which to pay it, the respondent could arbitrarily and capriciously refuse to certify the judgment for payment.

3. Also under the procedure in the Court of Claims the evidence would have to be taken before Commissioners, transcribed by reporters, and the expense thereof would be very considerable (Tit. 28, Secs. 276 to 278 U. S. Code).

In addition to the costs of proceeding in the Court of Claims, there would necessarily have to be added to the delay since the autumn of 1939, when the work was completed, and the present delay of approximately three and one-half years, a further indeterminate delay in obtaining judgment and an appropriation from which to pay same as provided in the Act of April 27, 1904 (33 Stat. 422).

SPECIFICATION OF ERROR TO BE URGED.

The court below erred in failing to hold:

(1) That the respondent had only a ministerial duty to perform in certifying for payment the amount of $23,614.70 as allowed in the decisions of September 5, 1941, as affirmed in the decisions of December 1, 1941, and June 27, 1942, by the Secretary of the Interior, rendered in accordance with Articles 4 and 15 of the contract between the United States and petitioner which made such decisions final and conclusive on both parties to the contract—there being no suggestion of fraud or mistake in any of the three decisions or otherwise in the case.

(2) That the decision of respondent refusing to certify for payment the said amount of $23,615.70 as allowed by the contracting officer and twice approved in the decisions

of December 1, 1941 and June 27, 1942, by the Acting Secretary of the Interior was so grossly erroneous as to be arbitrary and capricious.

(3) That the ~~respondent~~ petitioner did not have an adequate remedy in any other court and by any other proceedings to secure prompt payment of the said amount of $23,615.70 and which payment had been delayed for more than three years at the time the complaint was filed.

(4) That the respondent did not have jurisdiction and authority to repudiate, ignore, and disregard the representations of the Government engineer at the site of the work as to the location of the borrow pit area from which the material would be secured for the dam and the benefit of which representations the United States presumably secured in the form of a lower contract price than would have been possible if the petitioner's representatives had believed at the time of bidding that the borrow material might be secured over a wide area.

REASONS FOR GRANTING THE WRIT.

1. This Court has held, at least since *Kihlberg* v. *United States*, 97 U. S. 398, 403, in 1878, to and including *United States* v. *Callahan Walker Construction Company,* No. 65, on November 9, 1942, that parties to a Government contract may stipulate that the decision of the contracting officer or some other designated official shall be final and conclusive on both parties to the contract; in *Globe Indemnity Company* v. *United States,* 291 U. S. 476, that the jurisdiction of the Comptroller General under Section 305 of the Budget and Accounting Act of 1921, is "precisely that which was previously exercised by the Accounting Office in the Treasury Department" and that said Budget and Accounting Act was not intended "to disturb this construction of the statute or to make final administrative determinations in the executive departments any the less final settlements:" and in *United States* v. *Mason & Hangar Company,* 260 U. S. 323, affirmed in 261 U. S. 610, that over

the effect of decisions of the contracting officer designated in the contract to decide disputes arising thereunder the Comptroller "has no power" and that such decisions of the contracting officer are "conclusive in effect."

However, this Court has not decided—but should decide and determine—the remedy of the innocent party, the contractor, when there is a dispute as to the areas of authority and jurisdiction exercised by the contracting officer and/or the head of the department concerned in rendering a decision under a contract having stipulations similar to Articles 4 and 15 of petitioner's contract and the area of authority claimed and exercised by the Comptroller General in refusing to be bound by such a decision and to carry it into effect by certifying for payment the amount allowed in such decisions of the contracting officer and/or the head of the department concerned.

2. The United States is now engaged in a great war. The Court may take judicial notice of the fact that the public debt limit has been increased to proportions hitherto unknown in the history of the United States Government. Literally thousands of contracts have been and will be entered into between the United States and private parties. The Standard Government Forms of both Construction and Supply Contracts contain stipulations similar to Article 15 of this contract and the construction contracts contain articles similar to Article 4 of this contract.

It is a question of the highest public importance that both Government officials and Government contractors shall know as expeditiously as possible whether the respondent Comptroller General has the jurisdiction and authority to disregard and refuse to carry out the decisions of contracting officers and/or heads of departments concerned under contract stipulations similar or identical with Articles 4 and 15 of the petitioner's contract.

3. The United States Court of Claims has repeatedly protested in its published decisions against the refusal of

the Comptrollers General to comply with, and carry out decisions of contracting officers and/or heads of departments concerned under similar contract stipulations making their decisions final and conclusive. *Penn Bridge Company* v. *United States,* 59 Ct. Cls., 892; *Albina Marine Iron Works* v. *United States,* 79 Ct. Cls., 714; *McShain Company* v. *United States,* 83 Ct. Cls., 405; *Sun Shipbuilding & Dry Dock Company* v. *United States,* 76 Ct. Cls., 154; *Phoenix Bridge Company* v. *United States,* 85 Ct. Cls., 626; *Cain Company* v. *United States,* 79 Ct. Cls., 290; *Rumsey* v. *United States,* 88 Ct. Cls., 254. See also the above cited decision of this Court in *Mason & Hangar Company* v. *United States,* 260 U. S. 323, affirmed in 261 U. S. 610.

Must that court continue to be burdened with such cases as this of petitioner's; the private parties forced to incur great delays and forced to incur great expense; and the United States Government placed to the expense of employing attorneys, paying their travel expenses, etc., in an attempt to defend cases decided by the contracting officers and/or heads of departments concerned and after this Court has decided that the decision of the officer authorized in the contract to make the decision under similar contract stipulations must be carried out in the absence of fraud or gross mistake?

The petitioner believes that neither the United States Government nor contractors may any longer afford the luxury of such useless litigation which could be avoided if the Comptrollers General would comply with the law.

4. The respondent has disregarded the opinions and judgments of both this Court and of the Court of Claims as to the conclusive effect of decisions of contracting officers and/or heads of departments concerned under similar contract stipulations.

Respectfully submitted,

O. R. McGuire,
O. R. McGuire, Jr.,
Attorneys for Petitioner.